SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-9981

Robert Church, Petitioner

vs.

State of New Hampshire, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Robert Church, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Hampshire entered in the above-entitled case on September 30, 1975.

1. That the decision appealed from is a decision of the New Hampshire Supreme Court, 114 N.H. ____, 345 A 2d 392 (1975), a copy of which is appended.

2. The decision is dated September 30, 1975. Jurisdiction to review is conferred by 28 USC 1257(3).

3. The question presented for review is:
Does a sentence to a prison term of from eighteen months to three

years constitute a denial of equal protection of the law, substantive due process and fundamental fairness where such sentence is materially greater than a sentence imposed upon another defendant (in a separate case) for a violation of a superceding statute, encompassing the same type of activity, where by the terms of the superceding statute, the second defendant's crime involved acts which upon the rational and by terms of the statute indicate a greater and not a lesser degree of culpability; where the violation by the second defendant constituted a Class A felony by the terms of the statute, while the violation of defendant, Church, constituted a misdemeanor, and where defendant, Church, was sentenced to State Prison for a term at a minimum 6 times as long and a maximum twelve times as long as the other defendant found guilty of an act which under the statute amounts to a Class A felony.

4. The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States, Section 1,

all persons born or naturalized in the United States and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. That the Defendant was charged with the crime of performing unnatural and lascivious acts by an indictment handed up by the September, 1970 Term of the Grand Jury of Carroll County, the defendant was arraigned on said indictment on the 9th day of October, 1970 and entered a plea of not guilty. The Defendant was tried upon the indictment at the September, 1970 Term of the Carroll County Superior Court and on the 19th day of October, 1970 the Jury returned a verdict of guilty as charged. The conviction in Carroll County Superior Court was appealed to the Supreme Count of the State of New Hampshire and said conviction was sustained in a case reported as State vs. Church 113 N.H. 692 313 A2d 727, 1973. The Carroll County Superior Court then held a hearing and received evidence before imposing a sentence of not more than 3 years or less than 18 months in the New Hampshire State Prison. Four days pre-

viously the same Judge had sentenced a defendant who had pleaded guilty to a charge of violating RSA 632:2 deviate sexual relations. That defendant received a sentence of 12 months in the County House of Correction, 9 months to be suspended, with a probationary period. The defendant Church moved that the sentence of the Carroll County Superior Court be vacated and the defendant be afforded the same sentence imposed upon the defendant in the case of State vs. Patrick Nealon, Carroll County Number 3025. Defendant's Motion was denied, an exception was taken and a reserved case was filed with the Supreme Court of the State of New Hampshire. Defendant appealed the basis of the unequal sentence imposed upon the respective defendants in both of the above named cases. The Supreme Court of the State of New Hampshire on September 30, 1975 in an opinion to be printed in the New Hampshire Reporter Volume 114 Page as yet undetermined, dismissed Defendant's appeal without prejudice. A stay of execution has been granted petitioner pending the determination of the within petition.

6. The question sought to be reviewed was raised by Defendant's Motion to Vacate the Sentence of the Carroll County Superior Court after the original denial of exceptions by the New Hampshire Supreme Court. The Carroll County Superior Court reserved and transferred all questions of law raised by defendant's exceptions and Motion to Vacate Sentence to the New Hampshire Supreme Court.

7. The New Hampshire Supreme Court has decided a Federal question of substance

in a way probably not in accord with applicable decisions of this Court. The discrepancy in the sentences goes beyond the reasonable limits of judicial discretion and amounts to an abuse and denial of due process and equal protection. RSA 632:2, which was in effect at the time of the sentencing of defendant, Church, is said to restate the substance of RSA 579:9, the statute under which defendant Church was convicted. In the comments to RSA 632:2 in the 1974 New Hampshire Criminal Code it is stated that 579:9 was absorbed by 632:2 (632:2 is the section under which Patrick Nealon, the other defendant, was convicted). It is the contention of the defendant that he is being punished substantially more harshly for alleged violations of a statute making criminal the same act with which a subsequent defendant, Nealon, is charged, when the age of the alleged victim in the case of defendant, Church, was 16 and in the Nealon case, 6. The age factor under RSA 632:2 is sufficient to reduce the crime from a Class A felony to a misdemeanor. If the age factor is so central to the degree of culpability under the statute that it reduces the same act from a Class A felony to a misdemeanor, it should not be ignored for purposes of sentencing. The alleged victim in the Church case was 16 years old, the alleged victim in the Nealon case was 6 years old. In the Nealon case the defendant was guilty by the terms of the statute of a Class A felony. Under 632:2 which supercedes the statute under which

Church was convicted, Church was guilty of a misdemeanor. Defendant recognizes that substantial latitude exists regarding judicial discretion in sentencing but submits that to receive a sentence of at a minimum six times as long and at a maximum twelve times as long in State Prison for a crime defined as a misdemeanor where a defendant found guilty of a similar act defined as a Class A felony is an abuse of discretion rising to the level of denial of equal protection and the concept of fundamental fairness embodied in the substative due process concept of the Fourteenth Amendment.

December 23, 1975

ROBERT CHURCH
Petitioner

State of New Hampshire
Strafford, SS

Subscribed and sworn to,

Before me,

William P. Shea
Notary Public
State of New Hampshire
Comm. Exp. 10-31-78

Carroll
No. 7140

State of New Hampshire v. Robert Church

September 30, 1975

Warren B. Rudman, attorney general, and James L. Kruse, attorney (Mr. Kruse orally), for the State.

William P. Shea, by brief and orally, for the defendant.

PER CURIAM. This appeal challenges the sentence imposed on the defendant on the ground that it is more severe than the sentence imposed by the sentencing judge, Perkins, J., on a defendant convicted of a similar crime in an unrelated case. Church was convicted of committing unnatural and lascivious acts with a sixteen-year-old boy in violation of RSA 579:9. This conviction was sustained on appeal. State v. Church, 113 N.H. 692, 313A.2d 727 (1973). The superior court then held a hearing, received evidence, and imposed a sentence of not more than three years or less than eighteen months in the New Hampshire State Prison. Four days previously the same judge had sentenced a defendant who had pleaded guilty to a charge of violating RSA 632:2 (Deviate Sexual Relations). That defendant received a sentence of twelve months in the county house of correction, nine

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months to be suspended, and three years on probation, with conditions attached regarding treatment by the county mental health service and the possibility of extending the probation period. The only connection between the two defendants or between their crimes is that they were sentenced by the same judge for similar offenses. The defendant in this case learned of the sentence in the other case shortly after receiving his sentence. He immediately filed a motion that his sentence be vacated and that he "be accorded the same sentence imposed upon the defendant" in the other case. The motion emphasized that the victim in the other case was six years old, with the inference that that crime was more serious. The superior court heard argument on and denied the motion, and reserved and transferred the defendant's exception.

The defendant's contention is simply that all persons convicted of a particular crime must receive the same sentence. This has never been the law. Even if the crimes were identical, the defendants may not be. State v. Streeter, 113 N.H. 402, 308 A.2d 535 (1973). Implicit in the defendant's argument is a challenge to the fairness of his sentence considered by itself. This challenge may be addressed to the review division of the superior court. RSA 651:57 et seq.; Laws 1975, ch. 267. RSA 651:58 I requires applications for

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review of sentence to be filed within thirty days after sentencing, except for good cause shown. Such cause exists here because having seasonably pursued his pending appeal the defendant should now be entitled to apply to the review division. Therefore this appeal is dismissed to allow the defendant to pursue his statutory remedy.

Dismissed without prejudice.

SUPERIOR COURT

Carroll S.S. September Term, 1974

State V. Robert Church

No. 2152 MOTION

The defendant moves as follows:

1. That the sentence of the court be vacated and the defendant be accorded the same sentence imposed upon the defendant in the case of State V. Patrick Nealon, Carroll County No. 3025, to wit, twelve months in the house of correction with nine months of that suspended, together with accompanying restrictions upon the defendant.

2. That in the alternative, that execution of the sentence upon the defendant be stayed pending an appeal of the terms of said sentence to the Supreme Court of the State. That bail be continued in force.

Defendant assigns as grounds for said motion the fact that NEALON with a prior criminal record was given the above sentence for the same crime whose victim was a six year old boy who had no means to protect himself. This is discriminatory against the defendant whose alleged victim was sixteen years of age AND whose record was without blemish especially since the alleged commission

of this crime four years ago. Finally, it is discriminatory in that the suspension of execution of the defendant's sentence was recommended by both the Carroll County Attorney and Probation Officer.

_____
Atty. For defendant

Dated October 28, 1974.